that public investigations that could seriously harm future employment prospects would be actionable, but found no adverse action because the investigation "was not public." Here, the investigation into Rasty's alleged academic dishonesty (initiated on the heels of the conclusion of a discrimination grievance Rasty had filed, Pet. at 5-6) went to the heart of his career and future employment and was a public, two-year ordeal involving other faculty members.

In sum, application of these divergent tests is leading to real differences in results. Certiorari should be granted.[4]

4. A final point: this case is an ideal vehicle for resolving this important question. Pet. App. 20-23. Other cases presenting a similar question were inappropriate candidates. For example, in *Stavropoulos v. Firestone, et al.*, Case No. 04-1099, the alleged retaliatory acts "ultimately had no effect on [] employment status," including no impact on pay or benefits. *Id.*, Pet. App. at 11a. In sharp contrast, the retaliatory and discriminatory acts in this case did have a negative impact on Petitioners' employment status – they received lower salaries compared to similar non-minority faculty, were furnished unjustified poor performance reviews that resulted in proportionately lower raises and salaries, and Petitioner Rasty was subjected to costly and distracting investigations. Pet. App. 2-3. Moreover, the Fifth Circuit decided this case solely on the limited ground that the retaliatory acts did not meet the circuit's strict "ultimate employment decision" test; it did not reach alternative grounds, such as pretext.[5] Finally, the types of undisputed discriminatory

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[4] Respondents' citation to the Brief for Respondent in Opposition, *Vasquez v. Snow*, 541 U.S. 936 (2004) (mem.) (No. 03-887), is unpersuasive. BIO at 11. Though the brief noted that "it is unclear that there is any real difference in practice between the 'ultimate employment decision' standard . . . and the 'adverse employment action' standard," the Solicitor General made this point in reference to Eighth Circuit law. Brief for Respondent in Opposition at 5. The Eighth Circuit's position is almost as extreme as that of the Fifth. Pet. at 15-16.

[5] Other recent Fifth Circuit cases each were not worthy of certiorari. The question was not present in *Vasquez v. Snow*, 75 Fed. Appx. 275 (CA5 2003), *cert. denied*, 541 U.S. 936 (2004). Brief for Respondent Snow in Opposition at 4. In *Kang v. Bd. of Supervisors of La. State*

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and retaliatory acts as shown in the record below would allow the Court to determine what differences, if any, exist between actionable discrimination and retaliation claims.[6]

II. This Court Should Resolve The Circuit Split Over What Constitutes Discrimination.

A conflict exists between the Fifth and Eleventh Circuits regarding whether discriminatory pay raises are actionable. BIO 18-19. Respondents rely on *Harrington* to suggest that variations in pay raises of any significance may be actionable in the Fifth Circuit. BIO at 18. Yet, *Harrington* did not so hold, and it conflicts with the rationale and holding in *Gillis*, 400 F.3d at 888.[7] In *Harrington*, a threshold question was whether plaintiffs suffered an "adverse employment action." 118 F.3d at 365. Finding that "each Plaintiff did in fact receive, during each school year for which free speech retaliation is claimed, a merit pay increase," the Fifth Circuit

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Univ., 75 Fed. Appx. 974, 977 (CA5 2003), *cert. denied*, 541 U.S. 903 (2004), the complainant "receive[d] a pay raise and [ ]his raise was both substantial and larger than that received by some of his colleagues," thus indicating he may not have suffered an adverse action when compared to similarly-situated employees. Review in *Henandez v. Crawford Bldg. Material Co.*, 321 F.3d 528 (CA5 2003), *cert. denied*, 540 U.S. 817 (2003), would have been constrained because it would have been under a plain error standard (the employer had failed to object to jury instructions) rather than *de novo*, as it would be in this case.

[6] Contrary to Respondents' assertion (BIO 19-20), this Court will not get mired in alternative grounds for reversal. The questions presented are strictly limited to the appropriate standards for what constitutes actionable retaliation and discrimination; the Court may simply remand for further consideration, as it routinely does in employment cases.

To the extent Respondents argue (BIO at 17-18, n.10) that certiorari is inappropriate because it involves an unpublished, *per curiam* opinion, they forget this Court has granted certiorari before in such circumstances. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (*per curiam*).

[7] Besides being distinguishable on its facts, *Harrington* was not a Title VII discrimination case, but rather was a Section 1983 constitutional deprivation case, where public employee plaintiffs alleged retaliation for exercising First Amendment rights. *Ibid.*, 118 F.3d at 365.

held they did not have a viable First Amendment retaliation claim because "any harm resulting from decisions concerning 'pay increases' does not rise to the level of a constitutional deprivation." *Id.* at 366. The court followed circuit precedent and held that "a dispute over the quantum of pay increases" is not "an actionable adverse employment activity." *Id.* Even if it remained an open question after *Harrington* whether a dispute over pay raises is actionable, the Fifth Circuit answered it with a resounding "no" in this case.

The Fifth Circuit's rationale and result in the case under review directly conflicts with the Eleventh Circuit's in *Gillis*. *Gillis* follows a broader standard: "actions that affect compensation are considered adverse employment actions." *Ibid.* 400 F.3d at 887-88. *Gillis* recognized that "Title VII explicitly condemns discrimination in compensation" and held that "an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII." *Id.* at 888. *Gillis* conflicts with the reasoning and result in the case at bar. Pet. App. at 3 ("we have never held that a proportionately lesser pay increase, where an increase was received every year, could fulfill the [adverse action] requirement."); *cf. Russell v. Principi*, 257 F.3d 815, 817-19 (CADC 2001) (dispute over bonus actionable), *with Rabinovitz v. Pena*, 89 F.3d 482, 488-89 (CA7 1996) (dispute over bonus not actionable). Certiorari should be granted to resolve this conflict.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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